Filed 9/14/12 P. v. Vasquez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GLENN ADAM VASQUEZ, Defendant and Appellant.	E054057 (Super.Ct.No. FVA022463) OPINION

APPEAL from the Superior Court of San Bernardino County. Ingrid Adamson Uhler, Judge. Affirmed.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia, and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Glenn Vasquez was 15 years old in July 2004 when he participated in a shooting that killed Sergio Sanchez. In May 2011, a jury convicted defendant of one count of second degree murder and acquitted him of three counts of attempted murder. The jury found true the allegations that defendant had personally used a firearm, personally discharged a firearm, and personally discharged a firearm causing death during the commission of a murder offense but that the murder had *not* been committed for the benefit of a street gang. The court sentenced defendant to a term of 40 years to life.

On appeal defendant contends the trial court committed instructional error when it told the jurors they could not consider the lesser offense of voluntary manslaughter if they found the presence of implied malice. We hold there was no instructional error and affirm the judgment.

II

FACTUAL BACKGROUND

Defendant and the People generally agree about the operative facts while disagreeing about the reason defendant shot Sanchez.

A. Prosecution Evidence

On July 26, 2004, defendant lived at home with his parents and older brother, who was a member of the Inland Empire Fontana (IEF) gang. The jury did not find defendant guilty of a gang-related crime.

Sanchez, a West Side NHL gang member, was with a group of people planning to swim at a pool near Susan Gochez's apartment. Defendant hopped over the wall of the apartment complex and confronted Sanchez, "mad-dogging" him as defendant passed by. Defendant returned a few minutes later, again looking closely at Sanchez. At the wall, defendant made a challenging gesture by throwing up his hands and asking "what's up" before jumping back over the wall.

Sanchez and his friends followed defendant over the wall where defendant was waiting with his friends. Defendant and Sanchez argued and each made reference to gang affiliations. One of defendant's friends displayed a gun and Sanchez and his friends retreated back over the wall.

A few minutes later, while Sanchez spoke with Gochez's mother, the driver of a vehicle, defendant and his friends pulled up in another car. Defendant got out of his car and approached Sanchez, repeating "what's up now" and firing three shots at Sanchez. A bullet hit Sanchez in the left shoulder, puncturing his left lung, and striking two major blood vessels. He died in the hospital.

When defendant returned home about 11:30 p.m. that evening, officers were waiting for him. Defendant fled, dropping his gun. An officer apprehended defendant and arrested him.

B. Defense Evidence

Defendant testified that, three weeks before the shooting, he had been beaten by three NHL gang members, one of whom he recognized as Sanchez. Defendant had his brother's gun, which he had given to a friend when they arrived at the apartment complex

to visit defendant's girlfriend. When defendant saw Sanchez again, he was afraid and he shrugged his hands and shoulders and jumped over the wall. Sanchez and his friends confronted defendant. Defendant's friend handed defendant the gun. Sanchez and his friends backed off, nodding their heads to signal they would come after defendant later. Defendant and his friends then drove their car to where Sanchez was speaking with Gochez's mother. Defendant fired three shots at Sanchez and his friends, intending only to scare them.

III

INSTRUCTIONAL ERROR IS ABSENT

When reviewing a trial court's decision to issue a minor clarification to a deliberating jury requesting elucidation, the correct standard of review is abuse of discretion: "Where, as here, 'the original instructions are themselves full and complete, the court has discretion under [Penal Code] section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information.' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 522.)

In closing argument, the prosecutor argued defendant could be found guilty of second degree murder based on express malice aforethought (shooting with intent to kill) or implied malice aforethought (shooting with a conscious disregard for human life). Based on CALCRIM No. 570, the court instructed the jury that a killing may be "reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion." During deliberations, the jury submitted a written question: "Is

manslaughter a type of murder or a separate category from murder? If implied malice aforethought is present, can manslaughter be considered?"

The trial court reasoned that Penal Code section 192 states that manslaughter is the unlawful killing of a human being without malice. Therefore, the trial court additionally instructed the jury: "Both murder and manslaughter are types of homicide. Manslaughter is a lesser offense to murder. See CALCRIM 500. As to the second part of your question, the answer is no because voluntary manslaughter is the unlawful killing of a human being without malice, express or implied."

On appeal, defendant argues the court erred because, even if implied malice aforethought is present, a defendant may be guilty of manslaughter if he acts with conscious disregard for human life (implied malice) but unintentionally and unlawfully kills in a sudden quarrel or heat of passion. (*People v. Blacksher* (2011) 52 Cal.4th 769, 832-833, citing *People v. Lasko* (2000) 23 Cal.4th 101.)

Blacksher, addressing this principle, was decided after defendant's trial here. More fully, *People v. Blacksher, supra,* 52 Cal.4th at pages 832 and 833, said:

"Murder involves the unlawful killing of a human being with malice aforethought, but a defendant who intentionally commits an unlawful killing without malice is guilty only of voluntary manslaughter. (*People v. Breverman* (1998) 19 Cal.4th 142, 153.) For purposes of voluntary manslaughter, an intentional unlawful killing can lack malice when the defendant acted under a '"'sudden quarrel or heat of passion"'' or when the defendant acted under '"[an] unreasonable but good faith belief in having to act in self-defense."' (*Id*. at p. 154.) Two years after the trial here, in *People v. Lasko* (2000) 23 Cal.4th 101,

we clarified that voluntary manslaughter may also apply where a defendant 'acting with conscious disregard for life and knowing that the conduct endangers the life of another, *unintentionally* but unlawfully kills in a sudden quarrel or heat of passion.' (*Id.* at p. 104.)"

Respondent agrees with the general proposition that a person acting with conscious disregard for life, who unintentionally but unlawfully kills in a sudden quarrel or heat of passion, can be found guilty of voluntary manslaughter. Here, however, the jury did not inquire about the effect of a sudden quarrel or heat of passion on implied malice. Instead the jury asked only about implied malice and manslaughter. Implied malice can be lacking when a person acts from a sudden quarrel or heat of passion. (*People v. Blacksher, supra,* 52 Cal.4th at p. 832.) The trial court correctly told the jury that voluntary manslaughter does not involve implied malice aforethought. (*Ibid.*) Nothing prevented the jury from finding that defendant lacked malice and committed manslaughter, not second degree murder, because he acted from a sudden quarrel or heat of passion. The court properly instructed the jury on these principles, based on CALCRIM Nos. 500, 520, 522, and 570.

Because there was no error, we do not need to address defendant's additional arguments regarding the applicable federal or state standards of review for evaluating prejudice.

IV

DISPOSITION

The trial court did not commit instructional error. We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.